85801-2

No. 280543

COURT OF APPEALS

DIVISION III OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

vs.

TYLER WILLIAM GASSMAN, Defendant

DAVID R. PARTOVI, Respondent and Real Party in Interest

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
HONORABLE TARI S. EITZEN

APPELLANT'S BRIEF

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4. The trial court erred by finding that the original date of the crime charged by information was "April 15, 2008," rather than "on or about April 15, 2008."

5. The trial court erred by finding that the amended date of the crime charged by information was "April 17, 2008," rather than "on or about April 17, 2008."

II. ISSUES PRESENTED

Is the award of the $2000 sanction against the Prosecutor and in favor of Mr. Partovi supportable under either CrR 2.1 or the inherent authority of the court?

III. STATEMENT OF THE CASE

On July 25, 2008, Detective Marske prepared an affidavit to support criminal charges from a belatedly reported robbery, assault, and attempted murder. CP 22-23. The person coming forward and giving the detectives the information was a criminal participant in the crimes, a

getaway driver identified in the affidavit as MD (a juvenile male). CP 23. He had come forward to obtain a plea bargain. RP 6. lines 18-26, RP 7, lines 15-20. The victims of these crimes had not reported the crimes that had arisen three months earlier, because the robbery had occurred during their attempted illegal drug transaction - they were "not the most forthcoming individuals to say, hey, I was just robbed of my cash that I was going to make an illegal drug transaction for." RP 8, lines 6–12.

Based upon the information obtained from the cooperating criminal participant, the detectives were able to contact these recalcitrant victims. CP 22-23. The original affidavit supporting the filing of the Information stated that Eric C. Weskamp and Clifford Berger could testify that this drug deal/robbery occurred "on or about April 15, 2008." CP 22. The original report/affidavit also indicated that someone known to Mr. Berger only as "Kyle" was with Berger and helped Berger chase the robbers. CP 22-23. This affidavit was signed July 25, 2008, over three months after the robbery/assault took place. CP 23. The criminal information was filed by the State on July 28, 2008. It alleged that the offenses were committed by the defendant, "on or about April 15, 2008." CP 40-42.

Respondent Attorney Mr. Partovi's client, Tyler Gassman, was arraigned on August 5, 2008.[1] That same date the State's omnibus application was signed and ordered by the court. CP 46-48. Among other things, the court ordered that if the defendant was going to rely on an alibi, he must state so and furnish a list of the alibi witnesses and their addresses. CP 46-48, #2 and # 21. The court ordered that such information be supplied at least 10 days before the omnibus hearing. *Id.*

The criminal investigation continued. On October 29, 2008, Detective William Francis was able to contact the "Kyle" mentioned by Mr. Berger. CP 76-78 at 77. Detective Francis contacted Kyle Williams and obtained a statement. *Id.* Detective Francis advised Williams that he was trying to ascertain a more exact date of the alleged robbery. Williams explained that he had received a phone call from a "Rob" at 01:08 on April 18th, 2008. CP 78. Based on that phone call Williams believed that the robbery might have occurred about an hour to an hour and a half prior to the call. CP 78. A copy of Detective Francis' report dated October 31, 2008, containing this information was sent to defense counsel on or about November 4, 2008. CP 75. The report containing this information was

[1] Clerk's Papers, page 44, CP 44 hereinafter.

sent to Jo Blaney, the Records Clerk for the Spokane County Public Defenders Office.[2] CP 82.

On November 20, 2008, Detective Francis again met with Williams regarding this case. CP 79-80. At that time, Williams provided Detective Francis with a copy of his T Mobile cellular phone records for the date of April 18, 2008. *Id.* Williams again reiterated that the person named "Rob" was with victim Eric Weskamp at the time of the robbery and that he received a call from "Rob" a couple hours following the incident. *Id.* A copy of Detective Francis' November 20 report containing this information was sent to defense counsel on or about December 10, 2008. CP 75; CP 82 (showing receipt by the Public Defender).

On the morning of the day of trial, January 12, 2009, the state moved the court to amend the information to "more closely pinpoint the date of the offense by two days, to "on or about April 17" from "on or about April 15." RP 3. Mr. Partovi objected to the amendment, alleging he was being sandbagged, that he had prepared his case on an alibi defense

[2] Because Mr. Partovi was hired by the public defender's office to handle Mr. Gassman's case, the discovery was provided to the Public Defenders Office who then distributed it to the attorney involved in the case. See CP 82, listing "For: David R. Partovi" and listing the dates police report additionals are received and then sent to Mr. Partovi. See also RP 67-70 (Prosecutor Mr. Cruz explain the procedure to the Court)

and that now they found out on the morning of trial that it is the "wrong day." RP 3; RP 20, line 17. The Court responded that after she had heard Mr. Cruz's explanation, it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants. RP 15, lines 12-20. The court continued the amendment issue to the afternoon.

At the afternoon hearing, Mr. Partovi admitted that the defense attorneys had met on the weekend before trial, had reviewed the reports that indicated that the offense date may be April 17th, and that one of the attorneys, Ms. Nordtvedt, had been telling him that she thought the State may move to amend the date to the 17th. RP 22. The Court questioned Mr. Partovi regarding his alibi defense and he admitted that he never filed one and that he had been sloppy with following the rules.[3] On further inquiry by the Court it became clear that Mr. Partovi had not filed any notice of alibi leading the court to ask one of the codefendants attorneys to

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[3] The following occurs at RP 23-24:

THE COURT: Now you indicate, I think you have indicated that you were contemplating presenting an alibi defense.
MR. PARTOVI: Sure.
THE COURT: Did you serve notice of that?
MR. PARTOVI: I don't think it was written. It's always been the case in all three of the trials. I have given a witness list.
THE COURT: So the State is not the only one who has been a little sloppy.
MR. PARTOVI: I think that's correct, Judge. I think that's correct.

explain the proper procedure in an alibi response.[4] Mr. Partovi then alleged that an omnibus application had not been made by the state.[5] However, an omnibus application had been made by the state and the notice of alibi procedure was ordered by the court on August 5, 2009. CP 46-48.

After hearing from the attorneys regarding the motion to amend, the court stated it could not overemphasize that this confusion was an example of the breakdown in our criminal justice system based on a lack of resources and budget constraints. RP 38. The court found all parties at

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[4] The following occurs at RP 25:

COURT: Mr. Partovi, did you not serve written notice of your alibi defense on the State to sandbag Mr. Cruz?
MR. PARTOVI: Let me tell you what I -- and you tell me whether I served written notice of an alibi defense. On November 17, I gave him handwritten notes of names, phone numbers, summary of testimony of all three alibi witnesses.
THE COURT: What's the -- Ms. Nordtvedt, what's the rule on alibi defense?
MS. NORDTVEDT: I know you have to -- I know you should serve written notice like in response to an omnibus application. That's how I generally do it.

[5] Regarding the omnibus application at RP 25, lines 19-23:
MR. PARTOVI: Judge, I am not trying to suggest I have done every step in this case timely and perfectly. For the record, I would note I was not given omnibus application or discovery request that's not -- it's just -- this has been messy.

fault, stating: "[t]his is an alarming situation on both sides, attorneys not following the rules." RP 38, line 24-25; and RP 39, lines 11-12 ("I think the State did some sloppy stuff. Some of the defense was kind of sloppy.)

The court reviewed the amendment rule, CrR 2.1(d), and cases dealing with that rule. The court found there was no prejudice to the defense in allowing the amendment because they still had time to prepare within the confines of the speedy trial rule. RP 40–41 ("Those cases to me indicate and say that there is no prejudice where there is still time to prepare a defense.") The court continued the case to February 2, 2009, to allow the defendants sufficient time to prepare their defenses. RP 41. The court then *sua sponte* ordered $8000.00 in sanctions against the State for the careless, non-purposeful handling of the cases, stating that the court did not think the defendants should bear the financial burden of further preparation. *Id.* The court cautioned all counsel that they all would be expected to follow the rules in the future.[6]

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[6] I am continuing these cases based on the need for the defense to prepare sufficient defense to the first Monday in February, which is February 2nd. I am also sanctioning the State for what I consider to be, and I am not willing to say it was purposeful, but certainly a careless handling of these cases, and again, I'm very cognizant of the fact that the State has too many cases, as do defense counsel. But we have to stop and be more careful. And the court is guilty of the same thing. These past months with our caseloads, we all have to be more careful.

At the next scheduled hearing, January 21, 2009, Mr. Partovi presented an order granting the motion to amend the information, continuing the trial date and imposing sanctions. CP 24-25; RP 56-57. After interlineating that the defendants had sufficient time to prepare for trial, the court signed the order. *Id.* It then chastised Mr. Partovi because he had not filed a notice of alibi.[7] He filed one the next day. CP 52.

Saying that, I don't think the defendants should bear the financial burden and defense counsel the financial burden of going down one road and then finding out the defense is somewhere else. So, I am awarding as sanctions attorney fees payable to each defendant's counsel or their office in the case of the public defender's office of $2,000. So that's an $8,000 sanction against the State. I'm cautioning all counsel and, henceforth, you will be expected to follow the rules, each and every one of you.

RP 41-42.

[7]RP 63:
CRUZ: But the State was unaware of any alibi from Mr. Gassman or Mr. Kongchunji. The State understood it as just essentially complete denial.
THE COURT: So Mr. Partovi, in your omnibus application, did you state that you were going to present an alibi?
MR. PARTOVI: In my omnibus response?
THE COURT: Yes.
MR. PARTOVI: Judge, I don't know that I received an omnibus application from the State in this case.
THE COURT: You are supposed to tell them if you're relying on an alibi. Did you?
MR. PARTOVI: I don't recall.
MR. CRUZ: I looked at the file and I didn't see anything in Mr. Gassman's file as of Friday.

The state moved the court to reconsider the sanctions. CP 27-115. A hearing was held on the motion. RP 73-234. The court informed the parties that it was only dealing with the sanctions that were imposed in this case and was not dealing with what happened in the defendant's other cases. RP 80-81;[8] RP 189 lines 12-20. The court reiterated that it had never believed the amendment had be done purposefully, or to "hide the ball." RP 89.[9] The court also stated that regardless of whether the defense attorneys had done what they were supposed to do, or had properly prepared the cases in the first place, the issue was who had to pay for the additional time spent by the attorneys. RP 132.[10]

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[8] COURT: I want to be real clear with everybody, this isn't an appeal. This isn't a motion for reconsideration on the underlying cases. It really has nothing to do with them except as to the procedures that were followed and the ultimate issue of whether or not the court should reconsider its order imposing sanctions in the form of attorney fees because the State didn't provide the amended information to defense counsel until the morning of trial.

[9] THE COURT: I want to be real clear, Mr. O'Brien. I have never, and I think I was very careful in saying, I have never thought anybody was purposeful in terms of hiding the ball.

[10] THE COURT: But what happened, Mr. O'Brien, is, of course, that Ms. Nordtvedt, Mr. Partovi, and Mr. Note had to spend more time getting ready. Now, let's just say maybe that was because they weren't, didn't prepare enough in the first place or they didn't do what they were supposed to do or whatever.
MR. O'BRIEN: I am not pointing fault, Your Honor.

At the hearing, attorney Timothy Note, whom had expressed shock at the time of the amendment on January 12, 2009, now admitted having not been shocked with the amendment because he had reviewed the additional investigation by Detective Francis prior to the information amendment. RP 196-97 (not his job to "undumb the prosecutor.")

The court then considered what amount of sanctions should be assessed and considered the contracts the respective attorneys had with their clients. RP 211-236. Respondent attorney Mr. Partovi informed the court that his contract on this case was as a conflict attorney for the Spokane County Public Defenders Office. He was paid $1,400 and was paid an additional $200 per day for time in trial. RP 218-19. He informed the court that he had spent 10 hours or less as a result of the amendment of the information. RP 219.

The court denied the motion for reconsideration after explaining its reasoning:

THE COURT: But they had to spend more time getting ready and start talking to their clients about, okay, it wasn't the 15th, what were you doing on the 17th.
MR. O'BRIEN: Right. Well, let's say that that's correct. I am not -- again, I am not complaining about what --
THE COURT: But Mr. O'Brien, the issue to me is who should pay for that extra time.

> I'm not saying that Mr. Cruz did anything on purpose to be difficult. Here is what I think happened is the same thing I think happened that I thought at the time is that everybody has too much to do and it just got away from them. And we can't allow that because the State has a responsibility to be, you know, you have huge, huge, power and you have to be very, very, careful not to abuse that power. And I think what happened in this case, and I think from the reading of all the files, is that people started getting on each other's nerves. But I don't think that that meant that Mr. Cruz did that on purpose. I don't think that for a minute. He has appeared in front of this court for a number of years and I have never found him to be anything but totally above-board and professional and responsible. The reality is the State's actions in not moving to amend the Information in a more timely fashion incurred some expenses for folks and they shouldn't have to absorb it. The State should absorb it. It's as simple as that.

RP 236, lines 6-20.

IV. ARGUMENT

A. The trial court erred by assessing sanctions against the state and in favor of attorney respondent Mr. Partovi, because, as the trial court held, no violation of CrR 2.1(d) occurred where the state moved to amend the information, and because the sanction pertaining to a violation of that rule is a denial of the amendment, not sanctions.

STANDARD OF REVIEW

> Decisions either denying or granting sanctions are generally reviewed for abuse of discretion. *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)
>
> The trial court's denial of a motion for reconsideration is also generally reviewed for abuse of discretion. *Wagner Dev., Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 906, 977 P.2d 639, *review denied*, 139 Wn.2d 1005 (1999).

> When a court orders sanctions based on an erroneous view of the law, the court abuses its discretion because the order is manifestly unreasonable or is based on untenable grounds. *Fisons*, 122 Wn.2d at 338-39.
>
> A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. *Fisons*, 122 Wn.2d at 39, citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).

1. No violation of CrR2.1(d) occurred in this case.

Prior to trial, the state moved to amend the date of the offense from "on or about April 15, 2008" to "on or about April 17, 2008". The court rule governing such amendments is CrR 2.1(d).[11] Under this rule, the court may permit or deny any information to be amended *at any time before the verdict* or finding if substantial rights of the defendant are not prejudiced. *State v. Haner*, 95 Wn.2d 858, 631 P.2d 381 (1981) (the court has the power to refuse or allow an amendment to the information). See *State v. Johnston*, 100 Wn. App. 126, 996 P.2d 629 (2000) (amendment properly allowed at end of state's case-in-chief); *State v. Penn*, 32 Wn. App. 911, 650 P.2d 1111 (1982) (a prosecutor is free to add charges against a criminal defendant at any time prior to the beginning of trial so

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[11] CrR 2.1(d) provides:

> (d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

long as his motivation is not vindictive or based on unjustifiable standards); *State v. Murbach*, 68 Wn. App. 509, 512, 843 P.2d 551, (1993) (the fact that amendment of an information would deprive defendant of a defense she otherwise would have had was not the type of prejudice which would justify denying permission to the state to amend the information.)

The defendant has the burden of proving that the amendment of the information has prejudiced his substantial rights. *State v. Hakimi*, 124 Wn. App. 15, 26-27, 98 P.3d 809 (2004); *State v. Brisebois*, 39 Wn. App. 156, 692 P.2d 842 (1984). He failed to meet his burden. The defendant did not file an alibi claim until after the amendment.[12] Moreover, he had never requested a bill of particulars as required if he felt the "on or about" language did not adequately inform him of the date of the offense. See *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991), *reconsideration denied, denial of habeas corpus aff'd* 9 F.3d 802.[13]

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[12] CP 22 (Defendant's Notice of Intent to Rely on Alibi Defense filed January 22, 2009); RP 23-24 (Mr. Partovi admits he never gave written notice of alibi and that he was "sloppy" in that regard), RP 25 (Court has codefendant's counsel inform Mr. Partovi of correct procedure in serving written notice of alibi); RP 63 (Mr. Partovi admits he never responded to omnibus order where court ordered any notice of alibi to be provided); CP 52 (Gassman's Notice of Alibi filed January 21, 2009).

[13] *Noltie* provides that if an information states each statutory element of crime but is vague as to some other matter significant to defense, a bill of particulars can correct the defect, and that a defendant is not entitled to

Under the circumstances of the instant case, the amendment involved only a minor change in the charging period and was an amendment of form, not substance. See *State v. Fischer*, 40 Wn. App. 506, 511, 699 P.2d 249 (1985) (also discussing federal cases addressing the issue). Arguably, the amendment, while necessary to *remove* the firearm enhancement allegations contained in Count IV and V,[14] was not even necessary as to the date because the date "on or about April 15, 2008" includes the time frame covered by the amendment to "on or about April 17, 2008." See *United States v. Reed*, 887 F.2d 1398, 1403 (11th Cir. 1989):

> When the government charges that an offense occurred "on or about" a certain date, the defendant is on notice that the charge is not limited to the specific date or dates set out in the indictment. *United States v. Creamer*, 721 F.2d 342 (11th Cir.1983). Proof of a date reasonably near the specified date is sufficient. *United States v. Champion*, 813 F.2d 1154 (11th Cir.1987); *United States v. Grapp*, 653 F.2d 189, 195 (5th Cir. Unit A, 1981). Ordinarily, a variance between the date alleged and the date proved will not trigger reversal as long as the date proved falls within the statute of limitations and before the return of the indictment. *United States v. Harrell*, 737 F.2d 971, 981 (11th Cir.1984), *cert. denied*, 469 U.S. 1164, 105 S.Ct. 923, 83 L.Ed.2d 935 (1985). The fact that an alibi

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challenge information on appeal if he or she has failed to timely request bill of particulars.

[14] The amended information [CP 14-15] also amended counts IV and V in the defendant's favor by dropping the firearm enhancement allegations which were included in the original information [CP 42]. RP 13.

> defense is advanced does not render the time a material element of a criminal offense. *Creamer*, 721 F.2d at 343.

Moreover, an amendment to change the date where the offense has been charged as to state 'on or about' a certain date is proper on the eve of trial, because the defendant is deemed to be on notice that the charge is not limited to a specific date. *United States v. Mitov*, 460 F.3d 901, 907 (7th Cir. 2006)

The trial court properly found no prejudice resulting from the amendment. There is no prejudice if there is still time to prepare a defense. *State v. Kester*, 38 Wn. App. 590, 686 P.2d 1081 (1984). The trial court in the instant case granted the amendment, and found that the defendant was not prejudice and that the defendant still had time to prepare. CP 24-25; RP 40-41 (court discusses cases, including *State v. Earl*, 97 Wn. App. 408 (1999); and *State v. Kester*, *supra*; finds no prejudice, and finds defendant has time to prepare defense before allowing amendment). If the defendant were prejudiced by the amendment, the court could have denied it. *State v. Haner*, 95 Wn.2d 858; CrR 2.1(d).

The court however, improperly imposed a sanction of $2000 because it felt that the state was *careless* in not seeking to amend the information at some earlier date. CP 24-25 (Order granting Motion to Amend, Imposing Sanctions).

2. Neither case law, nor Rule CrR 2.1 authorized the sanction in this case.

The rule on amendments, CrR 2.1(d) does not authorize a monetary sanction, and moreover, by its own language contemplates amendments up until the close of trial. When sanctions are based on an erroneous view of the law, the court abuses its discretion because the order is manifestly unreasonable or is based on untenable grounds. *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d at 338-39. The award of sanctions is not supportable if it is based on CrR 2.1(d), a rule that authorizes an amendment up until the close of the state's case and under circumstances where, again by application of the rule, the court itself makes a finding of no prejudice to the defendant. If CrR 2.1(d) is violated, the remedy is to deny the amendment.[15] Compare *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

In *Bryant*, a law suit was filed by Mrs. Bryant seeking to invalidate the transfers of property by her husband. The respondents to the lawsuit filed a motion for a more definite statement as allowed under CR 12(e),

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[15] *State v. Wilke*, 28 Wn. App. 590, 595, 624 P.2d 1176 (1981) ("Moreover, there already exists a body of law protecting criminal defendants from last minute amendments to informations which result in prejudice or surprise. See CrR 2.1(d); *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968)").

the comparable civil rule to CrR 2.1(c) governing a motion for a bill of particulars.[16] Mrs. Bryant filed an amended complaint. Trial court Judge Huggins dismissed the amended complaint because the motion for a more definite statement had not been complied with. Later, a different judge, Judge Pechman, awarded CR 11 sanctions to the respondents against Mrs. Bryant's attorneys based upon their signing of the amended complaint. In affirming the appellate court's reversal of these CR 11 sanctions, the court held:

> If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. *Judge Huggins imposed the proper sanction under this rule when she dismissed the amended complaint without prejudice.* See CR 12(e). CR 11 sanctions are not appropriate where other

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[16] **CR 12(e) provides**:

> **Motion for More Definite Statement**. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just

CrR 2.1 (c) Bill of Particulars, provides:

> The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

> court rules more properly apply. See *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991) (misleading discovery disclosures may not be sanctioned under CR 11, but can be sanctioned under CR 26(g)'s provisions which govern discovery requests).

Bryant v. Joseph Tree, Inc., 119 Wn.2d at 223 (emphasis added).

The *Bryant* analysis is equally applicable here. Because there was no violation of CrR 2.1(d), and because the rule does not contain a provision authorizing an award of sanctions, the trial court's sanction award was based on an erroneous view of the law. That constitutes an abuse of discretion. *Fisons*, 122 Wn.2d at 39, citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).

B. The sanction award appears to be an attorney fee shifting mechanism which is not contemplated by the criminal or civil rules.

Ordinarily, sanctions are reserved for egregious conduct. *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994). In the instant case, the trial court found no egregious conduct.[17] Even CR 11 sanctions are not to be

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[17] THE COURT:
I'm not saying that Mr. Cruz did anything on purpose to be difficult. Here is what I think happened is the same thing I think happened that I thought at the time is that everybody has too much to do and it just got away from them.

. . . .

used as a fee shifting mechanism but, rather, are used as a deterrent to frivolous pleadings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220. If a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." *Biggs*, 124 Wn.2d at 201. There were no sanctionable filings in the instant case. The imposition of the sanction can only have a chilling effect on those prosecutors and defense attorneys seeking to advance meritorious claims. Compare *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d at 219 ("However, the rule [CR 11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.).

Finally, the amount of sanction is not supportable. Mr. Partovi's contract for handling the criminal case was $1,400. He got an additional $200 a day for trial work. He stated he had to do less than 10 additional hours of work. The award is more than his total contract, and would constitute a fee shifting equal to 10 days of trial work. In fact, the $2000 award was given on the day the case was amended, before the motion for reconsideration and before there was any indication by the attorneys as to how much time preparation would take. RP 41. An award amount

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The reality is the State's actions in not moving to amend the Information in a more timely fashion incurred some expenses for folks and they shouldn't

appears to be a fee shifting mechanism, which the rules do not provide for. See *MacDonald v. Korum Ford*, 80 Wn. App. 877, 891, 912 P.2d 1052 (1996) (discussing CR 11 sanctions).

C. The sanction award is not supportable under the trial court's inherent power to impose sanctions because the court found there was no bad faith or improper motive involved.

Even under its inherent power, the court may not impose sanctions unless it finds bad faith. See *State v. S.H.*, 102 Wn. App. 468, 475-76, 8 P.3d 1058 (2000). A frivolous claim or motion is not enough; there must also be an improper motive. See *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999) (*citing In Re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)), *review denied*, 140 Wn.2d 1010 (2000); see also *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir.1997) (holding that sanctions should be reserved for exceptional cases, not just cases in which the attorney's argument lacks merit).

The trial court repeatedly and emphatically held there was no bad faith involved in its award of sanctions this case. RP 15, lines 12-20; (court stating that after Mr. Cruz's explanation it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants);

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have to absorb it. The State should absorb it. It's as simple as that. See

RP 41-42 (state was careless not purposeful); RP 89 (court reiterated that it had never believed the amendment had be done purposefully, or to "hide the ball."); RP 236, lines 6-20 (court never thought it was purposeful, "I thought at the time is that everybody has too much to do and it just got away from them."); CP 124-129 (denying Defendant Gassman's CrR 8.3 motion to dismiss, holding there was no animus, evil intent or purposeful misconduct on the part of the State and further found that the defendants were not prejudiced with the amendment of the information); CP 24-25 (order continuing case and imposing sanctions, finding carelessness); CP 118 (order denying reconsideration, state did not act on purpose in late amendment, but was careless). Because there is a finding of no bad faith, and in fact many findings stating there was no bad faith, any sanction award based upon the court's inherent authority to impose sanctions is untenable, and a mistake of law.

RP 236, lines 6-20.

V. CONCLUSION

For the reasons stated herein, the Appellant respectfully requests that this Court reverse the lower court's award of sanctions to attorney Mr. Partovi.

Respectfully submitted this 9th day of November, 2009.

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